Filed 7/26/10 Sui v. Tan CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

YAN SUI, Plaintiff and Appellant, v. KENNY KEAN TAN, Defendant and Respondent.	G042548 (Super. Ct. No. 07CC07758) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Sheila Fell, Judge. Affirmed.

Yan Sui, in pro. per., for Plaintiff and Appellant.

Law Offices of Kenny Tan and Antony Chen for Defendant and Repsondent.

* * *

Appellant Yan Sui entered into binding arbitration with Kenny Tan, an attorney. The arbitrator issued an interim award in favor of Tan. The court denied Sui's petition to vacate the interim award, and granted Tan's subsequent petition to confirm the award, awarding Tan sanctions for Sui's frivolous petition to vacate. Sui then filed unsuccessful motions to reconsider and a motion for a new trial. Sui appeals, contending the court committed numerous errors. We affirm.

I

FACTS

Sui sued Tan, his former attorney, for professional negligence and breach of contract. Tan had advised Sui to dismiss without prejudice a limited jurisdiction lawsuit Sui filed in propria persona against his homeowners association because the limited jurisdiction court lacked jurisdiction over Sui's declaratory relief claim. Sui did so and then refiled the matter in superior court. In the interim, the homeowners association made a motion for costs and attorney fees which the court granted.

Sui and Tan stipulated to binding arbitration. After Sui presented his evidence at the August 15, 2008 arbitration hearing and rested, the arbitrator granted Tan's Code of Civil Procedure[1] section 631.8 motion for judgment on the professional negligence cause of action. The arbitrator noted, "Apart from exceptional cases, expert testimony MUST be used to establish the standard of care and the attorney's failure to meet that standard." Tan's section 631.8 motion was taken under submission as to the breach of contract cause of action. Tan then testified and was cross-examined by Sui.

The interim award found Tan the prevailing party "and against [Sui] who shall take nothing." The award authorized the parties to file any requests for changes or corrections and briefs on the issue of costs by October 22, 2008. The arbitrator concluded the breach of contract action was "in reality, one for Professional Negligence

[1] All undesignated statutory references are to the Code of Civil Procedure.

and therefore subsumed, in [Sui's] Professional Negligence claim which was resolved in [Tan's] favor pursuant to [section] 631.8." Lastly, the arbitrator found Tan was entitled to costs under the attorney-client fee agreement between Tan and Sui.

Sui filed a petition to vacate the interim arbitration award. Sui alleged: "a) Arbitrator refused to rule on issue of damages. Had he done that, should be in petitioner's favor; b) Arbitrator ignored Petitioner's prima facie evidence which proves Respondent's negligence; c) Arbitrator granted summary judgment against legal principles as cited by Petitioner's Points and Authorities. Petitioner's rebuttal is attached under 'Yan Sui's Notice of rej.[']" Arguing the court was required to vacate the award, Sui stated: "The case Arbitrator cited for 'informed tactics' and 'expert testimony' only proves Petitioner's point. His granting of summary judgment is against legal principle. Petitioner has cited sufficient cases to refute his ruling. Please review Petitioner's 'Grounds to Rebuttal Award.'" Sui asserted the award should be vacated based upon misconduct of the neutral arbitrator and the arbitrator unfairly refused to postpone the hearing or to hear evidence useful to settle the dispute.

The court denied Sui's petition to vacate, found his petition to vacate was frivolous, and granted Tan's motion for sanctions. The court awarded Tan $2,325 in attorney fees and $40 in costs.

Sui filed a motion to reconsider the award of sanctions and the denial of the petition to vacate the arbitration award. Ten days later, he filed an amended motion for reconsideration. In the motion, Sui alleged the attorney he hired to replace Tan was now suing him. According to Sui, this was important because he considered any money owed to the new attorney, Philip Putman, to be part of his damages and since the lawsuit occurred after the arbitration hearing, it was "beyond the power of the arbitrator to include that into the final award." The court denied Sui's motion on April 22, 2009. The court confirmed the arbitrator's award and later entered judgment in Tan's favor.

II

DISCUSSION

"'When parties opt for the forum of arbitration they agree to be bound by the decision of that forum knowing that arbitrators, like judges, are fallable.' [Citation.]" (*Burlage v. Superior Court* (2009) 178 Cal.App.4th 524, 529 (*Burlage*).) "The arbitrator's decision should be the end, not the beginning, of the dispute. [Citation.]" (*Moncharsh v. Heiley & Blase* (1992) 3 Cal.4th 1, 10.) "Ensuring arbitral finality . . . requires that judicial intervention in the arbitration process be minimized. [Citations.]" (*Ibid*.) "Thus, it is the general rule that, with narrow exceptions, an arbitrator's decision cannot be reviewed for errors of fact or law. In reaffirming this general rule, we recognize there is a risk that the arbitrator will make a mistake." (*Id*. at p. 11.) That risk is acceptable because the parties "have agreed to bear that risk in return for a quick, inexpensive, and conclusive resolution to their dispute" (*ibid*.), and "the Legislature has reduced the risk to the parties of such a decision by providing for judicial review in circumstances involving serious problems with the award itself, or with the fairness of the arbitration process." (*Id*. at p. 12.) Those limited circumstances are set forth in sections 1286.2 [grounds to vacate the award] and 1286.6 [grounds to correct the award]. (*Id*. at pp. 12-13.)

Thus, "[w]e do not review the merits of the dispute, the sufficiency of the evidence, or the arbitrator's reasoning, nor may we correct or review an award because of an arbitrator's legal or factual error, even if it appears on the award's face. Instead, we restrict our review to whether the award should be vacated under the grounds listed in section 1286.2. [Citations.]" (*Roehl v. Ritchie* (2007) 147 Cal.App.4th 338, 347.) With these precepts in mind, we turn to the merits of Sui's appeal.

Section 1286.2 requires the court to vacate an arbitration award if the court determines the arbitrator "exceeded [his or her] powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted."

(§ 1286.2, subd. (a)(4).) According to Sui, the arbitrator exceeded his authority in concluding expert testimony was necessary to establish an attorney's conduct fell below that required, because "[t]he issue of expert testimony was never submitted to [the] arbitrator for decision." The argument is without merit. The arbitrator ruled on the question of whether Sui proved Tan failed to act as a reasonably competent attorney. If the arbitrator concluded any failure on Tan's part was not "so clear" that he could find Tan violated the applicable standard of care, expert testimony was required. (*Wilkinson v. Rives* (1981) 116 Cal.App.3d 641, 647–648.) Whether expert testimony was required to make the requisite showing was an evidentiary issue properly decided by the arbitrator and not an act in excess of the arbitrator's powers.

Sui, relying upon *Burlage v. Superior Court* (2009) 178 Cal.App.4th 524,[2] argues the arbitrator excluded material evidence of Sui's damages and refused to postpone the hearing for Sui to present evidence of damages the arbitrator would find acceptable. Sui's reliance on *Burlage* is misplaced. *Burlage*, involved a sale of property where the buyers (the Burlages) discovered after escrow closed that the swimming pool and a wrought iron fence on their property encroached onto neighboring property. (*Burlage, supra,* 178 Cal.App.4th at p. 527.) The arbitrator substantially prejudiced the seller in excluding the seller's evidence that the title company obtained a lot line adjustment from the neighbor prior to the arbitration hearing. (*Id*. at pp. 527-528.) Here, the arbitrator found that Sui did not establish liability and thus, the amount of "damages" Sui believed he had suffered was immaterial. Therefore, the arbitrator's refusal to

[2] Sui's opening brief relied upon an earlier decision in *Burlage* superceded by a grant of review, *Burlage v. Superior Court* (2009) 177 Cal.App.166. He subsequently asked us to take judicial notice of the decision on rehearing, *Burlage, supra,* 178 Cal.App.4th 524. That request is granted.

Sui's request for judicial notice filed on February 10, 2010 is denied as unintelligible. To the extent it contains citations to the record on appeal, the court has read and considered in this opinion the pages to which the request refers.

postpone the hearing so Sui could obtain acceptable evidence of his "damages" did not prejudice Sui.

Relatedly, Sui contends the arbitrator "failed to rule on . . . damages" by refusing to postpone the hearing so Sui could introduce evidence of his damages. Again, however, the arbitrator found Sui did not establish a breach of a professional negligence. "Damages," as such, do not exist without liability.

Sui makes several incomprehensible arguments which lack citations to applicable authority (Cal. Rules of Court, rule 8.204(a)(1)(B)) or the record (Cal. Rules of Court, rule 8.204(a)(1)(C)). In one instance, he cites three cases for a proposition, but does not state how each case applies. Nor does he state what pages in the opinions support his argument. Two of the cases do not involve arbitrations. The remaining case was depublished eight years ago. (See Cal. Rules of Court, rule 8.1115(a).)

Sui also argues the arbitrator had no power to rule on "add-on" damages, the $40,000 in attorney fees Putman, the attorney who replaced Tan, sued Sui to recover. Frankly, we do not understand his argument, but it appears Sui again ignores the fact that he failed to prove liability.

Finally, Sui contends the court erred in granting sanctions against him for filing a frivolous petition to vacate, because he should not be held to the same standard as a lawyer. The argument has no merit. "The purpose of section 128.7 is to deter frivolous filings." (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 826.) That purpose would be frustrated if an unrepresented party could file a completely frivolous petition and avoid sanctions by claiming he did not know better because he is not a lawyer. For that reason, propria persona litigants are held to the same standards as attorneys. (See *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 985 ["A doctrine generally requiring or permitting exceptional treatment of parties who represent themselves would lead to a quagmire in the trial courts, and would be unfair to the other parties to litigation."] Moreover, sanctions were sought pursuant to section 128.7. That section, by

its very terms, applies to propria persona litigants as well as attorneys. (§ 128.7, subds. (b), (c); see *Li v. Majestic Industrial Hills LLC* (2009) 177 Cal.App.4th 585, 590.)

While it appeared in Sui's opening brief he was challenging the trial court's denial of his motion for reconsideration (or his amended motion for reconsideration), he affirmatively disavowed such a challenge in his reply brief. He does, however, claim the trial court erred in denying his motion for a new trial.[3] We are at a loss to understand what trial he is referring to, and simply note that Sui does not cite to anywhere in the record where the court denied his motion. (Cal. Rules of Court, rule 8.204(a)(1)(C).) The only reference in his statement of facts is: "The court kept silent on it and summarily denied this motion without opinion or notice."

"A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) The presumption in favor of a judgment cannot be overcome when the appellant court lacks a record sufficient to decide whether the presumption has been rebutted. (*Id*. at pp. 1133-1134.) Not only does the lack of a record showing Sui's motion was denied prohibit us from concluding the trial court erred, it also precludes us from concluding the trial court ever ruled on the motion.

[3] The record on appeal does not contain Sui's motion for a new trial, although it does contain Tan's "Counter-Designation of Records on Appeal" wherein he requests that his opposition to Sui's new trial motion be included in the record on appeal. Tan submitted a conformed copy of his motion for new trial with his reply brief and asks that we take judicial notice (Evid. Code, § 451) of an uncertified document purporting to be a portion of the register of actions of the superior court, and a document that purports to be a portion of his on-line credit card statement reflecting a July 6, 2009 payment of $40 to the superior court. The on-line credit card statement is not a proper subject for judicial notice and that request is denied. The document purporting to be a portion of the superior court's register of actions is not certified and that request is denied. However, as it appears the purpose behind the request for judicial notice is for this court to accept that the conformed copy of his motion for new trial he attached to his reply brief was filed in the superior court, we construe his request to be for judicial notice of the fact that he filed the motion for new trial attached to his reply brief. There having been no objection from Tan, we grant that request.

Accordingly, we find Sui forfeited this claim. (*Gee v. American Realty & Construction Inc*. (2002) 99 Cal.App.4th 1412, 1416.)

Tan has requested sanctions on appeal. (See § 907.) The request was not made in a motion supported by declaration as required by California Rules of Court, rule 8.276. The request, therefore, is denied.

III

DISPOSITION

The judgment and the superior court's sanctions order are affirmed. Tan shall recover his costs on appeal.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

O'LEARY, J.